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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Repeal of Section 52.31 of the Commission's Rules Regarding Commercial Mobile Radio Service Local Number Portability	)	RM - 10792

To: The Commission

EXPEDITED PETITION FOR RULEMAKING
TO RESCIND THE CMRS LNP RULE

June 16, 2003

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SUMMARY

CTIA, Cingular, AT&T Wireless Services and ALLTEL hereby petition the Commission to rescind the CMRS LNP rule because the FCC lacks statutory authority to impose the obligation. This matter was recently raised at the D.C. Circuit in connection with the FCC denial of Verizon's petition for permanent forbearance. The Court affirmed the FCC's decision not to forbear, but did not rule on the merits of the statutory authority argument, observing that this matter could only be raised, given the lapse of time since the original rulemaking, in connection with a petition to rescind the rule or in connection with an enforcement action. Thus, the instant petition constitutes an appropriate vehicle by which judicial review may be obtained. Expedited action is requested so that, if necessary, petitioners can have their day in court before the fast approaching November 24, 2003 deadline and because carriers already have numerous mandates (*e.g.*, E911) and limited resources.

The FCC's authority must be grounded in a delegation of power from Congress. Where Congress delegates limited authority, the FCC cannot adopt rules expanding that authority simply because Congress did not expressly foreclose the possibility. The Commission cannot act where Congress has left no hole for the agency to fill. The statute here not only fully addresses the subject matter (LNP), but also delineates the carriers (LECs) subject thereto. The Commission's authority over LNP is thus clearly bounded.

The FCC's authority to impose LNP requirements derives from Section 251(b) of the Act. Section 251(b)(2) imposes the duty to provide number portability in accordance with the requirements prescribed by the Commission. Unlike other subsections in Section 251 which apply to the broader class, telecommunications carriers, or the narrower class, incumbent LECs, Section 251(b) pertains only to LECs. The statutory definition of LECs specifically excludes wireless carriers, unless the Commission determines there is a demonstrated regulatory need to deem them LECs. The FCC consistently has held that wireless carriers are not LECs. Thus, it is clear from the statutory scheme that Congress intentionally limited the FCC's authority to impose LNP and specifically exempted CMRS.

The Commission's invocation of implied authority to impose wireless LNP through the general provisions of Sections 1, 2, 4(i) and 332 of the Act is without merit because it conflicts with the statutory scheme. Wireless LNP is not mentioned in these sections and is not necessary for the Commission to discharge its responsibilities. The FCC's wireless LNP rule, 47 C.F.R. § 52.31, is therefore beyond the FCC's statutory authority and must be rescinded.

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EXPEDITED PETITION FOR RULEMAKING
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The Cellular Telecommunications & Internet Association ("CTIA"), the international organization for the Commercial Mobile Radio Service ("CMRS") industry, Cingular Wireless LLC, AT&T Wireless Services, Inc. and ALLTEL Communications, Inc. ("Petitioners"), pursuant to Section 1.401(a) of the Commission's rules, 47 C.F.R. § 1.401(a),[1] hereby submit this petition for rulemaking to rescind Section 52.31 of the Commission's rules, 47 C.F.R. § 52.31, which imposes local number portability ("LNP") requirements on CMRS carriers.[2] As discussed more fully below, the Commission does not have statutory authority to impose such obligations on CMRS carriers. Expedited action is requested given the impending November 24, 2003 deadline when the rule becomes effective.

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[1] Section 1.401(a) states that "[a]ny interested person may petition for the...repeal of a rule...."

[2] Petitioners are a trade association whose members are CMRS carriers and certain CMRS carriers. All are affected by the application of LNP obligations to the CMRS industry under the rule (*e.g.*, increased cost to implement the mandate and diversion of reasorces from implementation of other mandates).

Section 52.31 states in pertinent part that "[b]y November 24, 2002, all covered CMRS providers must provide a long-term database method for number portability...."[3] On June 6, 2003, the U.S. Court of Appeals for the D.C. Circuit ("Court") dismissed in part and denied in part the petition of CTIA and Verizon Wireless for review of the *Verizon Order* denying permanent forbearance from enforcement of Section 52.31.[4] The Court dismissed the challenge to the Commission's authority to impose wireless LNP as time-barred with regard to the 1996 LNP rulemaking decision.

Nevertheless, the Court held that a challenge to the Commission's statutory authority over wireless LNP could be raised by filing a petition to rescind the rule and appealing a denial of the petition. Specifically, it held that:

> [T]here are at least two notable circumstances in which the Court will entertain challenges beyond a statutory time limit to the authority of any agency to promulgate a regulation: (1) following enforcement of the disputed regulation; and (2) *following an agency's rejection of a petition to amend or rescind the disputed regulation.*[5]

The *NLRB* case recognized that "a petitioner's contention that a regulation should be amended or rescinded because it *conflicts with the statute* from which its authority derives is reviewable outside of a statutory limitations period" for challenging the original rulemaking.[6]

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[3] 47 C.F.R. § 52.31. The rule in its entirety is appended hereto at Attachment A. It is currently scheduled to go into affect November 24, 2003. See *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, Memorandum Opinion and Order*, 17 FCC Rcd 14972 (2002) ("*Verizon Order*").

[4] *Cellular Telecommunications & Internet Ass'n and Cellco Partnership d/b/a Verizon Wireless v. FCC*, No. 02-1264 (D.C. Cir. June 6, 2003).

[5] *Id.*, Slip at 11 citing See *NLRB Union* v. *FLRA*, 834 F. 2d 191, 195-97 (D.C. Cir. 1987) (emphasis added).

[6] 834 F. 2d at 196-197.

The instant petition therefore requests that the Commission rescind Section 52.31 on the grounds that the FCC did not have delegated authority from Congress to adopt the wireless LNP requirement. There is no need for public comment on the instant petition. The FCC has already considered this pure question of law and concluded that it has authority to impose LNP.[7] The November 24, 2003 LNP deadline is looming and there is no reason to delay further resolution. Petitioners are merely seeking their day in court, if necessary, to determine whether the FCC lawfully imposed LNP on CMRS carriers before the FCC-imposed mandate goes into effect.

The Commission stipulated, in agreeing to the voluntary dismissal of the appeal of the original LNP rulemaking (which included a jurisdictional challenge), to preserve all issues raised for any future appeal.[8] Specifically, the FCC agreed it "shall not object" to the presentation of the "same issues and arguments...*in* any other proceeding involving review" of FCC action on *number portability*.[9] Despite the clear intention of the parties, the Court of Appeals did not review the merits and found that the agreement did not bind the Court.[10]

By this filing, Petitioners continue to seek what the FCC and Verizon Wireless's predecessor appeared to have preserved from the original appeal. Expeditious action is requested so that any unnecessary diversion of resources can be avoided if the FCC now recognizes it lacks the requisite authority, or ultimately is found to lack authority.

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[7] *LNP First Report and Order*, 11 FCC Rcd. 8352, 8431-32 (1996); *see also Verizon Order*, 17 FCC Rcd. at 14973, n. 4; FCC Brief, D.C. Cir. No. 02-1264, at 33-39 (filed Feb. 3, 2003).

[8] See Joint Motion for Dismissal, Bell Atlantic NYNEX Mobile, Inc. v. FCC, No. 97-9551 (10th Cir. Filed March 19, 1999) (appended hereto at Attachment B).

[9] Attachment B, Stipulation at 1.

[10] *CTIA v. FCC*, Slip at 11.

THE COMMISSION LACKS STATUTORY AUTHORITY TO IMPOSE THE CMRS LNP REQUIREMENT

The Commission lacks statutory authority to impose the CMRS LNP requirement in the first instance and, thus, Section 52.31 must be repealed. An agency has no power to act without a delegation by Congress;[11] it possesses only those powers *granted* by Congress. Stated another way, an agency does not possess all powers *except those forbidden* by Congress – otherwise agencies would have virtually limitless discretion in violation of *Chevron* and the Constitution.[12] The Commission cannot adopt rules simply because Congress did not expressly preclude such action, especially where Congress left no "gap for the agency to fill."[13]

With respect to LNP, section 251 of the Act is the sole statutory provision addressing LNP. That section references all telecommunications carriers (including CMRS providers), local exchange carriers ("LECs") and incumbent LECs, and delineates which entities are required to provide LNP. "Statutory provisions *in pari materia* normally are construed together to discern their meaning."[14] Accordingly, the various provisions of section 251, construed together,

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[11] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Stark v. Wickard*, 321 U.S. 288, 309 (1944); *Motion Picture Ass'n v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("MPAA").

[12] *Railway Labor Exec Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 665, 670-71 (D.C. Cir. 1994).

[13] *Railway*, 29 F.3d at 671 (*citing Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1994)). *See also Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998) ("[A]gency power is 'not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)), *aff'd*, 529 U.S. 120 (2000).

[14] *MPAA*, 309 F.3d at 801 (*citing Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972)).

establish the scope of the Commission's power to require LNP. Simply put, then, the FCC is empowered to require LNP only to the extent specified in section 251.[15]

Congress, in section 251, expressly limited the class of carriers to be subject to LNP requirements. Specifically, sections 251(a)-(c) set forth a "carefully-calibrated regulatory regime crafted by Congress," with a "three-tiered hierarchy of escalating obligations based on the type of carrier involved."[16] Subsection (a) sets forth the relatively limited duties applicable to all telecommunications carriers, but is silent regarding LNP. Subsection (b) imposes five separate obligations, including LNP, *applicable only to LECs*, and gives the Commission LNP standard-setting authority. At the same time, Congress defined LECs to *exclude* CMRS carriers unless and until the FCC determines otherwise,[17] a finding the FCC has repeatedly and correctly declined to make.[18] Section 251(c) imposes additional requirements on *incumbent* LECs. Moreover, in contrast to the limited authority to impose LNP in subsection (b), section 251(e) gives the FCC plenary authority over numbering administration. Thus, it is clear Congress knew

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[15] *See Railway*, 29 F.3d at 671; *Chevron*, 467 U.S. at 843-44. *See also MPAA*, 309 F.3d at 801

[16] *Guam Public Utilities Commission*, 12 FCC Rcd 6925, 6937-38 (1997).

[17] 47 U.S.C. § 153(26) ("The term 'local exchange carrier' . . . does *not* include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term") (emphasis added).

[18] *See Verizon Order*, 17 FCC Rcd at 14972-73 ("Commercial Mobile Radio Service (CMRS) carriers are not LECs, and thus are not included in section 251(b) . . . ."); *Petition of the State Independence Alliance for a Declaratory Ruling*, 17 FCC Rcd 14802, 14806 (2002) ("CMRS providers are not subject to the statutory requirements imposed on LECs in section 251(b)"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15996 (1996) (stating that the FCC will not define CMRS providers as LECs absent evidence that wireless services "replace wireline loops for the provision of local exchange service") (subsequent history omitted); *Administration of the North American*

(continued on next page)

how to include and exclude CMRS carriers regarding LNP and to define the FCC's jurisdiction narrowly (LNP) or broadly (numbering administration) as it deemed appropriate. It reviewed the competitive landscape and decided LNP should be required only of LECs.

The exclusion of carriers other than LECs from LNP requirements and other section 251(b) requirements reflects a deliberate choice by Congress, negating any implied power of the Commission to choose otherwise. As the Supreme Court has held, "an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance."[19] Here, Congress intended to confine the LNP requirement to LECs. This is confirmed in the Act's legislative history. The original House bill included portability as one of the "specific requirements of openness and accessibility that apply to LECs as competitors enter the local market."[20] The Act's Conference Report states that "the duties imposed by new section 251(b) make sense only in the context of a specific request from another telecommunications carrier or any other person who actually seeks to connect with or provide services using the LEC's network."[21]

The FCC recognized in implementing section 251 that the statute withdrew authority to impose LNP on wireless carriers:

> The statute . . . *explicitly excludes* commercial mobile service providers from the definition of local exchange carrier, and therefore from the section 251(b) obligation to provide number

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Numbering Plan Carrier Identification Codes, 13 FCC Rcd 3201, 3206 n.21 (1998) (noting that CMRS providers "are not classified as LECs").

[19] *Field v. Mans*, 516 U.S. 59, 67 (1995).

[20] H.R. Rep. No. 204, 104th Cong., 1st Sess. 71-72 (1995).

[21] Joint Explanatory Statement, H.Conf. Rep. 104-458, 10th Cong., 2d Sess. 121 (1996).

> portability, unless the Commission concludes that they should be included in the definition of local exchange carrier.[22]

Simultaneously, however, the Commission found "independent authority" to require wireless LNP "as we deem appropriate" from the general delegations in sections 1, 2, 4(i), and 332 of the Act.[23] These provisions do not mention LNP, nor can they serve as a jurisdictional basis to override the specific reservations in section 251.

Reliance on these provisions is barred by the canon of statutory construction that "the specific governs the general."[24] This canon is "a warning against applying a general provision *when doing so would undermine limitations created by a more specific provision.*"[25] Congress spoke comprehensively and specifically to LNP in section 251(b). Thus, the FCC cannot rely on general powers conferred by sections 1, 2, 4(i) and 332 to negate Congress' contrary directive. The separate statement of Commissioner Furchtgott-Roth in the *2000 Forbearance Reconsideration Order* aptly observes:

> The Commission has grounded its [wireless LNP] authority in sections 1, 2, 4(i), and 332 of the Communications Act. I have long voiced concern about this agency's efforts to impose costly and far-reaching regulatory obligations based on authority cobbled together from various general and ancillary provisions of the Act. Such assertions of jurisdiction are particularly troubling here in

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[22] *LNP First Report,* 11 FCC Rcd at 8431 (emphasis added).

[23] *Id.* at 8431-32. The *Verizon Order* references the *LNP First Report* where, in response to challenges by Petitioners and others, the FCC fully addressed its implied authority to require wireless LNP. *Verizon Order*, 17 FCC Rcd at 14972 & n.3.

[24] *Morales v. Transworld AirLines*, 504 U.S. 374, 384-385 (1992) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)).

[25] *Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996) (emphasis added).

> light of section 251's statutory provision specifically mandating number portability solely for local exchange carriers.[26]

Nor do these sections grant the Commission independent jurisdiction to impose LNP requirements on CMRS providers. As the Court recognized in *MPAA*, the FCC has "necessary and proper" authority only where another provision contains a specific delegation of authority.[27]

Sections 2 and 4(i) contain no affirmative mandates.[28] Further, Section 1 constitutes only a general delegation of authority to the Commission and never mentions LNP.[29] It grants the Commission such limited authority as is "reasonably ancillary to the effective performance of the Commission's various responsibilities."[30] Courts have upheld the FCC's exercise of ancillary jurisdiction in cases where (1) Congress did *not* expressly address and define the scope of the Commission's authority with respect to the regulated area at issue; and (2) there was a demonstrated need to imply authority to discharge the will of Congress.[31] Here, however, Congress has clearly expressed its will regarding LNP in section 251(b) and thus there is no basis to invoke ancillary authority under section 1.

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[26] *Telephone Number Portability, Cellular Telecommunications Industry Association's Petition for Forbearance*, 15 FCC Rcd 4727, 4739 (2000) ("*2000 Forbearance Reconsideration Order*") (Separate Statement of Commissioner Furchtgott-Roth).

[27] *MPAA*, 309 F.3d at 806.

[28] *Cf.* 47 U.S.C. §§ 152, 154(i). Section 4(i) states that the Commission may undertake only those acts that are consistent with the terms of the Act.

[29] *Cf.* 47 U.S.C. § 151.

[30] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also California v. FCC*, 905 F.2d 1217, 1240-41 & n.35 (9th Cir. 1990).

[31] *See, e.g., Southwestern Cable*, 392 U.S. at 164-78 (upholding FCC authority to regulate cable where there were no preexisting statutory provisions regarding FCC oversight of the cable industry and the FCC demonstrated a need to regulate flowing from its broadcast responsibilities).

In fact, section 1 was enacted to ensure that all Americans "have access to wire and radio communication transmissions" and the mandate is a "reference to the geographic availability of service."[32] LNP, however, does not deal with access to service in a particular area. It is a service feature provided to a subscriber who already *has* service.

Finally, section 332 cannot serve as authority for the FCC to impose a wireless LNP mandate. While Section 332 does constitute a grant of authority over certain wireless matters, it is silent regarding LNP and thus cannot be read as an override of the specific statutory scheme of Section 251(b). Even assuming that the Act did not already speak to the question of which entities must offer LNP, Section 332 still would not provide a basis for implied authority. This section requires the Commission to treat CMRS providers as common carriers but permits the FCC to forbear from certain statutory requirements normally associated with landline service, (*e.g.*, tariffs).[33] It also preempts state regulation over wireless rates and market entry.[34] The main objectives of section 332 are regulatory parity among like wireless services and deregulation.[35] Thus, as the FCC has recognized:

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[32] *MPAA*, 309 F.3d at 804.

[33] *See* 47 U.S.C. § 332(c)(1)(A). Under the Act and the Commission's rules, a "common carrier" is not the same as a "LEC." "Common carrier" is a broad category of entities that offer services to the public, while "LEC" includes only carriers that offer service within, and access to, a telephone exchange network.

[34] *See id.* § 332(c)(3)(A).

[35] *See* H.R. Rep. No. 103-111, at 259-60 (1993) (emphasizing the purpose of section 332 to achieve "regulatory parity" among providers of "equivalent mobile services"); *Petition of the Connecticut Department of Public Utility Control*, 10 FCC Rcd 7025, 7030-31 (1995) ("*Connecticut DPUC*") (recognizing that section 332 expresses a "general preference in favor of reliance on market forces rather than regulation," and "places on [the FCC] the burden of demonstrating that continued regulation will promote competitive market conditions"), *aff'd sub nom. Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2nd Cir. 1996).

> Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.[36]

No showing has been made (nor could be made) that imposing wireless LNP is needed to carry out the objectives of section 332.

The Commission further expanded its assertion of implied authority to impose wireless LNP in its brief filed in *Cellular Telecommunications & Internet Ass'n and Cellco Partnership d/b/a Verizon Wireless v. FCC*, No. 02-1264 (filed Feb. 3, 2003). The FCC did not dispute that (1) Section 251(b)(2) is the only provision of the Act specifically addressing LNP; (2) Section 251(b)(2) grants the Commission specific authority to impose LNP requirements only on LECs and Section 153(26) defines the term "LEC" to exclude CMRS carriers, unless the FCC finds otherwise;[37] and (3) the FCC has consistently ruled that CMRS carriers are not LECs. But, it did argue that because Section 153(26) grants it authority to define the scope of the term LEC, the Act "suggests strongly that Congress decided to leave the question of extending LEC-specific requirements to CMRS carriers to the expert judgment of the Commission." FCC Br. 34. This argument stands the statute on its head and is inconsistent with the legislative history.

Nothing in Sections 153(26) or 251 authorizes the Commission to pick and choose LEC-specific requirements to impose on CMRS carriers, absent a finding that CMRS carriers are LECs. Indeed, could it do so, Section 153(26) would be nullified and useless. Section 153(26) authorizes the Commission to determine whether the term LEC should include wireless carriers.

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[36] *Connecticut DPUC*, 10 FCC Rcd at 7035 (1995); *see also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 7992 (1994) ("[C]onsumer demand, not regulatory decree, [should] dictate[] the course of the mobile services marketplace.").

[37] 47 U.S.C. §§ 153(26), 251(b)(2).

If, and only if, the Commission makes that finding, do wireless carriers become subject to a variety of LEC-specific requirements. Moreover, the FCC admitted that:

> Because the development of the wireless industry has a different history – one in which service already was provided by a number of carriers in 1996, and not through a monopoly – Congress did not explicitly impose all of the obligations in Section 251 on wireless carriers.

FCC Br. 34.

The FCC also argued that it had implied authority over wireless LNP prior to the enactment of Section 251(b)(2) and the 1996 Act evinced "no intent to *take away* the Commission's authority to require telecommunications carriers that are not LECs to offer LNP." FCC Br. at 33 (emphasis added). The Commission's argument missed the point. Section 251(b)(2) does not constitute a repeal of pre-existing authority. Rather, it sets forth a specific mechanism by which the Commission can impose LNP requirements on wireless carriers. Thus, insofar as the FCC has correctly decided that CMRS carriers are not LEC equivalents, it lacks authority to impose LNP obligations on wireless carriers.

In any event, the Commission's attempt to create the impression that it had pre-existing authority before the passage of Section 251 and 153(26) in the 1996 Act is wrong. Prior to the 1996 Act, the Commission had "asserted authority" over LNP by way of a "tentative" finding in a Notice of Proposed Rulemaking which asked for comment. *See In the Matter of Telephone Number Portability*, 10 F.C.C.R. 12350 (1995). It had not issued any final ruling, nor was there judicial review of the matter. The FCC *ruled* it had implied authority only *after* the 1996 Act. *See Telephone Number Portability*, 11 F.C.C.R. 8352. Thus, the FCC has not shown there was

any LNP authority to be preserved by the 1996 Act's savings clause (47 U.S.C. § 152 note).[38] More important, the enactment of Section 251 resolved the question, setting up a specific mechanism by which the Commission could impose wireless LNP.

The Commission's reliance on case law stemming from its general authority in Sections 1, 4(i) and 332 was also without merit. As noted above, ancillary jurisdiction can only be invoked where (1) Congress did *not* expressly address and define the scope of the Commission's authority with respect to the regulated area at issue, and (2) there was a demonstrated need to imply authority to discharge the will of Congress. The cases cited are consistent therewith.[39] Here, by contrast, Section 251(b)(2) expressly delineates the FCC's authority over LNP.

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[38] Further, the Supreme Court has "repeatedly 'declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Geir v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000) (citations omitted); *see also AT&T & Central Office Telephone, Inc.*, 524 U.S. 214, 227-28 (1998).

[39] *See* FCC Br. at 35-38. *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (Commission authority to establish the Universal Service Fund can be implied from its statutory obligation to make communications service available to all the people of the United States); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1109 (D.C. Cir. 1981) (extending tariffing obligations to a previously-exempted carrier was appropriate to allow the Commission to ensure that rates and terms and conditions of service are reasonable); *Nader v. FCC*, 520 F2d 182, 204 (D.C. Cir. 1975) (extending rate-setting authority to include prescribing rate of return); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973) (Commission has authority to require common carriers to provide computer network services through a separate affiliate because such requirement was substantially related to Commission statutory obligations, but has no authority to bar common carriers from purchasing computer services from their own affiliate because such rule was unrelated to the regulation of the communications market); *North American Telecom Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985) (statute was silent regarding proposed limited regulation of holding companies and the Court noted that "Section 4(i) is not infinitely elastic" and cannot be used to regulate an activity unrelated to the communications industry or to contravene another provision of the Act) (citations omitted); *Mobile Comm Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (statute was silent on payments for pioneers procedures). Judge Edwards, in his dissent to *Mobile Comm*, characterized the FCC's reliance upon implied authority as follows: "charitably speaking, the argument is something akin to the FCC saying
(continued on next page)

The Commission's citation to *Qwest Corp. v. FCC*, 252 F.3d 462, 464 (D.C. Cir. 2001), also does not support a contrary conclusion. *Qwest* involved a dispute regarding intercarrier compensation, not LNP. Further, the question of whether Section 332 is an independent basis of Commission authority on interconnection matters, has no bearing on whether the Commission has authority to impose LNP obligations on wireless carriers.

Thus, the Commission's theory appeared to be that it has authority to impose wireless LNP because Section 251(b)(2) does not specifically prohibit wireless LNP. A similar Commission theory was rejected by the Court as "entirely untenable." *MPAA*, 309 F.3d at 805. Indeed, to uphold the Commission's arguments would provide federal agencies "virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Railway*, 29 F.3d at 671 citing *Chevron*, 467 U.S. at 843-44, cited in *MPAA*, 309 F.3d 801, 805-06. While the decision in *MPAA* admittedly addressed First Amendment concerns, the Court relied upon general principles of law and statutory construction recognized in *Railway* to hold that the Commission cannot presume authority to regulate a matter simply because Congress has not expressly withheld such power. *MPAA*, 309 F.3d. at 805-06. Here, the FCC is going even further than in *MPAA* by presuming authority in direct contravention of the Act.

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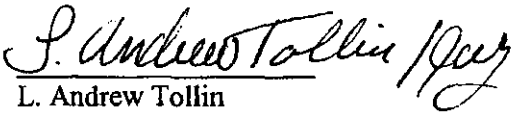
that it 'has the power to do whatever it pleases merely by virtue of its existence,' a suggestion that this court normally would view as 'incredible.'" *Id.*, 77 F.3d at 1413 (dissent in part).

CONCLUSION

For the foregoing reasons, the petition should be acted on expeditiously and the rule rescinded.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION
CINGULAR WIRELESS LLC
AT&T WIRELESS SERVICES, INC.
ALLTEL COMMUNICATIONS, INC.

By: 

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June 16, 2003

ATTACHMENT A

TITLE 47--TELECOMMUNICATION

CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION

PART 52--NUMBERING--Table of Contents

Subpart C--Number Portability

47 C.F.R. § 52.31

Sec. 52.31 Deployment of long-term database methods for number portability by CMRS providers.

(a) By November 24, 2002, all covered CMRS providers must provide a long-term database method for number portability, including the ability to support roaming, in the MSAs identified in the Appendix to this part in compliance with the performance criteria set forth in section 52.23(a) of this part, in switches for which another carrier has made a specific request for the provision of number portability, subject to paragraph (a)(1) of this section. A licensee may have more than one CMRS system, but only the systems that satisfy the definition of covered CMRS are required to provide number portability.

(1) Any procedure to identify and request switches for development of number portability must comply with the following criteria: (i) Any wireline carrier that is certified (or has applied for certification) to provide local exchange service in a state, or any licensed CMRS provider, must be permitted to make a request for deployment of number portability in that state;

(ii) For the MSAs identified in the appendix to this part, carriers must submit requests for deployment by February 24, 2002;

(iii) A covered CMRS provider must make available upon request to any interested parties a list of its switches for which number portability has been requested and a list of its switches for which number portability has not been requested;

(iv) After November 24, 2002, a covered CMRS provider must deploy additional switches serving the MSAs identified in the Appendix to this part upon request within the following time frames:

(A) For remote switches supported by a host switch equipped for portability (``Equipped Remote Switches''), within 30 days;

(B) For switches that require software but not hardware changes to provide portability (``Hardware Capable Switches''), within 60 days;

(C) For switches that require hardware changes to provide portability (``Capable Switches Requiring Hardware''), within 180 days; and

(D) For switches not capable of portability that must be replaced (``Non-Capable Switches''), within 180 days.

(v) Carriers must be able to request deployment in any wireless switch that serves any area within the MSA, even if the wireless switch is outside that MSA, or outside any of the MSAs identified in the Appendix to this part.

(2) By November 24, 2002, all covered CMRS providers must be able to support roaming nationwide.

(b) By December 31, 1998, all covered CMRS providers must have the capability to obtain routing information, either by querying the appropriate database themselves or by making arrangements with other carriers that are capable of performing database queries, so that they can deliver calls from their networks to any party that has retained its number after switching from one telecommunications carrier to another.

(c) The Chief, Wireless Telecommunications Bureau, may waive or stay any of the dates in the implementation schedule, as the Chief determines is necessary to ensure the efficient development of number portability, for a period not to exceed 9 months (i.e., no later than September 30, 1999, for the deadline in paragraph (b) of this section, and no later than March 31, 2000, for the deadline in paragraph (a) of this section).

(d) In the event a carrier subject to paragraphs (a) and (b) of this section is unable to meet the Commission's deadlines for implementing a long-term number portability method, it may file with the Commission at least 60 days in advance of the deadline a petition to extend the time by which implementation in its network will be completed. A carrier seeking such relief must demonstrate through substantial, credible evidence the basis for its contention that it is unable to comply with paragraphs (a) and (b) of this section. Such requests must set forth:

(1) The facts that demonstrate why the carrier is unable to meet our deployment schedule;

(2) A detailed explanation of the activities that the carrier has undertaken to meet the implementation schedule prior to requesting an extension of time;

(3) An identification of the particular switches for which the extension is requested;

(4) The time within which the carrier will complete deployment in the affected switches; and

(5) A proposed schedule with milestones for meeting the deployment date.

(e) The Chief, Wireless Telecommunications Bureau, may establish reporting requirements in order to monitor the progress of covered CMRS providers implementing number portability, and may direct such carriers to take any actions necessary to ensure compliance with this deployment schedule.

ATTACHMENT B

IN THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

No. 97-9551

BELL ATLANTIC NYNEX MOBILE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

On Petition to Review an Order of the
Federal Communications Commission

JOINT MOTION FOR DISMISSAL

Petitioner Bell Atlantic NYNEX Mobile, Inc. ("BAM") and Respondent Federal Communications Commission ("FCC"), pursuant to Rule 42 of the Federal Rules of Appellate Procedure, hereby jointly move this Court to dismiss the above-referenced appeal without prejudice. The parties have entered into a Stipulation of Dismissal attached hereto. The Stipulation provides that BAM will dismiss this appeal voluntarily, and that the FCC will not object to BAM raising any of the issues and arguments presented in this appeal in any future review proceeding

concerning number portability obligations of commercial mobile radio service providers. The parties have also agreed that each party will bear its own costs incurred in connection with BAM's appeal.

Accordingly, BAM and the FCC request that the Court enter an order dismissing this appeal without prejudice.

Respectfully submitted,

BELL ATLANTIC NYNEX MOBILE, INC.

By: _____

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FEDERAL COMMUNICATIONS COMMISSION

By: _____

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March 19, 1999

STIPULATION OF DISMISSAL

WHEREAS, Bell Atlantic NYNEX Mobile, Inc. ("BAM"), filed an appeal of two orders of the Federal Communications Commission ("FCC") regarding the imposition of number portability obligations on commercial mobile radio service ("CMRS") providers (CC Docket No. 95-116), which is now pending before the United States Court of Appeals for the Tenth Circuit (Case No. 97-9551);

WHEREAS, the parties desire to enter into this stipulation in exchange for BAM dismissing its appeal in the Tenth Circuit, in order to conserve the resources of the parties in further litigating this appeal;

NOW, THEREFORE, the parties signing below hereby stipulate to the following:

1. BAM shall dismiss its appeal (Case No. 97-9551) in the Tenth Circuit.

2. The FCC shall not object to BAM's presentation of the same issues and arguments presented in this appeal in any other present or future proceeding involving review of an FCC action or order concerning CMRS number portability.

3. Each party shall bear its own costs incurred as a result of BAM's appeal in the Tenth Circuit.

4. The parties agree that dismissal of this appeal does not constitute any implicit or explicit representation regarding the merits of this appeal or the lawfulness of the FCC's decisions to impose or maintain number portability obligations on CMRS providers. The parties further agree that dismissal does not constitute any waiver by BAM of any objections to the continued imposition of number portability obligations, and does not constitute any agreement that such obligations are lawful.

5. BAM and the FCC shall promptly file a "Joint Motion for Dismissal" in the Tenth Circuit in the form attached hereto.

6. The parties agree to cooperate in whatever action is necessary to effectuate dismissal of BAM's appeal.

7. The persons signing this Stipulation represent that they are duly authorized to bind the party specified. This Stipulation may be signed in counterparts, and the Stipulation with all such counterparts shall be treated as a single document.

Executed this 18th day of March, 1999.

BELL ATLANTIC NYNEX MOBILE, INC.

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FEDERAL COMMUNICATIONS COMMISSION

By: _____
John E. Ingle
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Office of General Counsel
Federal Communications Commission
445 Twelfth Street, S.W.
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CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing "Joint Motion for Dismissal" to be sent by first-class mail, postage prepaid, this 19th day of March, 1999, to the following persons:

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